



**Before the  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of a 1993 Chevrolet Corvette, VIN  
1G1YY33P4P5116538, Purchased by Terry Kahl.

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Case No.: 97-H-1042

**FINAL DECISION**

Terry Kahl applied to the Department of Transportation for a title and registration for a 1993 Chevrolet Corvette. By letter dated November 5, 1996, the Department refused to issue a title or registration to him. By letter dated May 5, 1997, Mr. Kahl requested a hearing to review the Department's decision.

Pursuant to due notice a hearing was held on July 2, 1997, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last submission was received on July 9, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Terry Kahl, by  
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The administrative law judge issued a proposed decision on August 8, 1997. Mr. Kahl filed comments supporting the proposed decision, but objecting to a statement in the "Discussion" section indicating that the decision in Schultz v. Bank of the West, 934 P.2d 421 (Or. 1997), was relied on as only persuasive authority. Mr. Kahl cites a concurring opinion in Miracle Feeds, Inc., v. Attica Dairy Farm, 129 Wis. 2d 377, at 385, 385 N.W.2d 208 (Ct. App. 1986), for the proposition that the Uniform Commercial Code "mandate of uniformity makes the decisions of other states 'more than mere persuasive authority.' The opinion continues by stating that "when Wisconsin cases do not answer a question arising under the Uniform Commercial Code, we should examine other courts' decisions to be sure our result is consistent with theirs."

Other than indicating that the decisions of other states are "more than mere persuasive authority," the opinion cited by Mr. Kahl does not indicate how much reliance should be given to decisions from other states. Additionally, in its post-hearing brief First Federal Savings Bank La Crosse-Madison cited a decision from another state which holds contrary to Schultz. Apparently, the decisions of other states are not consistent on this issue. Accordingly, it is appropriate to cite Schultz as only persuasive authority. No other comments on the proposed decision were received. The proposed decision is adopted as the final decision in this matter.

#### Findings of Fact

The Administrator finds:

1. On June 8, 1996, Terry Kahl contracted to purchase a 1993 Chevrolet Corvette, VIN 1G1YY33P4P5116538, from Capitol Corvette. Pursuant to the purchase contract, Mr. Kahl paid \$30,362.50 including tax, license and title fees for the subject vehicle. Terry Kahl took possession of the 1993 Chevrolet Corvette and retained possession of the vehicle as of the date of the hearing in this matter. ---

2. In June, 1996, Capitol Corvette was a motor vehicle dealer conducting business at 5400 King James Way, Madison, Wisconsin, 53719. Capitol Corvette was in the business of selling used motor vehicles. Capitol Corvette was a sole proprietorship and held motor vehicle dealer license number 1047. David C. Larson was the owner and sole proprietor of Capitol Corvette. On December 9, 1996, the Division of Hearings and Appeals issued an order revoking Capitol Corvette's motor vehicle dealer license (Docket Nos. 96-H-986 and 96-H-993).

3. The Division of Motor Vehicles of the Department of Transportation (DMV) is part of an agency of the State of Wisconsin and is authorized under sec. 218.01, Stats., to license, inspect, and regulate motor vehicle dealers in Wisconsin. DMV also has the authority under chapters 341 and 342, Stats., to issue titles and registration for motor vehicles in Wisconsin.

4. The 1993 Chevrolet Corvette purchased by Terry Kahl was owned by Burton Wright. Mr. Wright borrowed money from First Federal Savings Bank La Crosse-Madison (First Federal) for the purchase of the subject vehicle and First Federal has a perfected security interest in the subject vehicle. Mr. Wright had entered into a consignment agreement with Capitol Corvette to sell the vehicle. Capitol Corvette failed to pay Mr. Wright the purchase price for this vehicle, in violation of the terms of the consignment agreement. The loan to First Federal has not been paid off and First Federal still has a security interest in the subject motor vehicle.

5. Terry Kahl applied to the DMV for Wisconsin title and registration for the subject vehicle. Because of conflicting ownership claims, the DMV refused to issue a title or registration to Terry Kahl.

6. When Terry Kahl purchased the subject vehicle from Capitol Corvette, he was not aware that it was owned by Burton Wright or that the Corvette was sold on consignment by Capitol Corvette for Mr. Wright. Terry Kahl purchased the Corvette at Capitol Corvette's business premises and he believed that Capitol Corvette owned this vehicle and had the authority to sell it. Capitol Corvette did not inform Mr. Kahl that the Corvette was owned by Mr. Wright.

7. Terry Kahl has never worked for an automobile dealer, nor has he worked in the automotive industry. Prior to this transaction, Terry Kahl had not had any financial dealings with Capitol Corvette or David Larson.

8. Terry Kahl purchased the subject motor vehicle in good faith and without knowledge that the sale was in violation of the ownership rights of Burton Wright. Terry Kahl is a buyer in the ordinary course of business of the subject motor vehicle.

### Discussion

Terry Kahl has applied to the DMV for a certificate of title and registration for the subject motor vehicle. Pursuant to secs. 342.11(1) and 342.12(2), Stats., the DMV refused to issue a title or registration to Mr. Kahl for the subject motor vehicle.<sup>1</sup>

The Wisconsin motor vehicle code is silent with respect to issuance of a title and registration in this situation. The transaction is regulated by the Uniform Commercial Code (UCC). Pursuant to the sec. 402.403(2), Stats., "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business." In the instant matter, Burton Wright entrusted the subject motor vehicle to Capitol Corvette for the purpose of selling the vehicle. Accordingly, Capitol Corvette had the power to transfer ownership of the vehicle to a buyer.

Capitol Corvette has authority to transfer interest in the vehicle even if the consignor has retained title. In general, the interests of a consignor are not protected unless the consignor complies with one of the three alternatives set forth at sec. 402.326(3), Stats., relating to informing prospective creditors of the consignee of a

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<sup>1</sup> Sec. 342.11(1), Stats., provides in relevant part:

The department shall refuse issuance of a certificate of title for any of the following reasons.

(1) The department has reasonable grounds to believe that:

- (a) The person alleged to be the owner of the vehicle is not the owner.
- (b) The application contains a false or fraudulent statement.

Sec 342 12(2), Stats., provides in relevant part:

(2) If the department is not satisfied as to the ownership of the vehicle or that there are no undisclosed security interests in it, the department, subject to sub (3), shall either:

- (a) Withhold issuance of a certificate of title until the applicant presents documents reasonable sufficient to satisfy the department as to the applicant's ownership of the vehicle and that there are no undisclosed security interests in it, or
- (b) Issue a distinctive certificate of title pursuant to sec. 342.10(4) or 342.283.

potential security interest.<sup>2</sup> Burton Wright has not alleged that he complied with the provisions of sec. 402.326(3), Stats.

Terry Kahl purchased the vehicle from Capitol Corvette. He was unaware that Capitol Corvette was selling the vehicle on consignment. Even if Mr. Kahl had been aware that the vehicle was being sold on consignment, there is no evidence that he should have suspected that Capitol Corvette did not intend to use the proceeds of this sale to pay the consignor or the sale was fraudulent in any manner.

Mr. Kahl has the burden to prove that he is a buyer in the ordinary course of business. The phrase "buyer in the ordinary course of business" is defined at sec. 402.201(9), Stats. Sec. 401.201(9), Stats., provides in relevant part that: "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to the person is in violation of the ownership rights or security interest of a 3rd party in the goods buys in ordinary course from a person in the business of selling goods of that kind . . . ' Based on the evidence in the record, it appears that Terry Kahl is a good faith purchaser who purchased the vehicle without knowledge that the sale was in violation of the ownership rights of Burton Wright. Terry Kahl purchased the vehicle from Capitol Corvette, a licensed motor vehicle dealer, which at the time of the purchase was a company in the business of selling used motor vehicles.

First Federal does not dispute that Terry Kahl is a buyer in the ordinary course of business and that he is entitled to a Wisconsin title and registration for the subject motor vehicle. The other issue to be decided is whether First Federal retains its security interest in the vehicle. Sec. 409.307(1), Stats., provides:

A buyer in ordinary course of business as defined in s. 401.201 (9) other than a person buying farm products from a person engaged in farming operations takes

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<sup>2</sup> Sec. 402.326(3), Stats., provides in relevant part:

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which the person deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. This subsection is applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

- (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
- (b) Establishes that the person conducting the business is generally known by that person's creditors to be substantially engaged in selling the goods of others; or
- (c) Complies with the filing provisions of ch. 409.

free of a security interest created by his or her seller even though the security interest is perfected and even though the buyer knows of its existence.

The question becomes whether, for purposes of sec. 409.307(1), Stats., Capitol Corvette or Burton Wright is the seller in this transaction. In a recent case involving similar facts, the Oregon Supreme Court held that "seller" in this context "refers to the *legal owner* of the goods purchased by a buyer in the ordinary course of business." (emphasis in original) Schultz v. Bank of the West, 934 P.2d 421 (Or. 1997).

The court in Schultz further found that the consignment seller did not transfer title to the goods to the purchaser; therefore, it was not the seller. Rather, the consignor, the party that ultimately parted with the title, was the seller for purposes of ORS 79.3070(1) (the Oregon equivalent of sec. 409.307(1), Stats.). First Federal attempts to distinguish Schultz from the instant case on the basis that Oregon, by statute, has expressly made this provision of the UCC applicable to motor vehicles, while Wisconsin has not.

First Federal argues that sec. 409.307(1), Stats., does not apply to motor vehicle liens that are subject to Chapter 342, Stats., (Chapter 342 is titled the Vehicle Title and Anti-theft Law). Sec. 342.19(1), Stats., provides:

Unless excepted by s. 342.02, a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or secured parties of the vehicle unless perfected as provided in this chapter.

Chapter 342, Stats., does govern the perfection of security interests in motor vehicles; however, the creation of a security interest is governed by Chapter 409, Stats.. Milwaukee Mack Sales v. First Wis. Nat. Bank, 93 Wis. 2d 589, 287 N.W.2d 708 (1980). Similarly, the motor vehicle code is silent on the effect of a perfected security interest; therefore, the effect must also be controlled by the UCC. Additionally, even though Oregon has expressly made the relevant provision of the UCC applicable to motor vehicles, while Wisconsin has not, the court in Schultz was interpreting a term in a provision of the UCC. The court's interpretation of the word "seller" in this context was not dependent in any way on the Oregon motor vehicle code. The court's analysis for holding that "seller" refers to legal owner is persuasive and will be adopted for purposes of this decision.

Finally, First Federal argues that it is contrary to public policy to allow Terry Kahl to take title to the subject motor vehicle free of First Federal's perfected security interest because, of the innocent parties involved, the only one which could not prevent the transaction was the lender, First Federal. In another case involving fraud in a motor vehicle transaction, the Wisconsin Supreme Court stated that "... either the original seller or the ultimate buyer must suffer loss because of fraud. In all transactions of this type a seller takes the more obvious risks, and has better methods available for reducing or

avoiding them than the ultimate buyer. Between them, we think it just that the loss should fall on the seller." Hudiburg Chevrolet v. Ponce, 17 Wis. 2d 281, 116 N.W.2d 252 (1962).

Although no lender was involved in Hudiburg, the same policy is applicable in the instant case. As stated by First Federal in its letter brief, a lender bases a lending decision in part on the credit worthiness of the borrower. The lender must rely on the borrower to maintain the value of the collateral for the loan. Although the lender may not be able to prevent the consignment sale, the borrower can protect the collateral not only, as mentioned by First Federal, by not consigning the vehicle, but also by complying with one of the three alternatives set forth at sec. 402.326(3), Stats. If the borrower has not adequately protected the value of the collateral, the lender's remedy should be with the borrower, not an innocent purchaser.

Terry Kahl was a buyer in good faith who paid to Capitol Corvette an amount which was presumably the market value of the subject motor vehicle. For these reasons, Terry Kahl should receive title to the vehicle free of First Federal's perfected security interest.

#### Conclusions of Law

The Administrator concludes:

1. Pursuant to sec. 402.403(2), Stats., Capitol Corvette had the power to transfer all of Burton Wright's ownership rights in the subject motor vehicle to a buyer in the ordinary course of business.
2. Terry Kahl is a buyer in the ordinary course of business of the subject motor vehicle. Pursuant to sec. 402.403, Stats., Terry Kahl has acquired title and ownership of the subject motor vehicle.
3. For purposes of sec. 409.307(1), Stats., Burton Wright is the seller of the subject motor vehicle. The security interest of First Federal in the subject motor vehicle was created by Burton Wright, the seller. As a buyer in the ordinary course of business, Terry Kahl takes title to the subject vehicle free of First Federal's perfected security interest.
4. Pursuant to secs. 346.26 and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

#### Order

The Administrator orders:

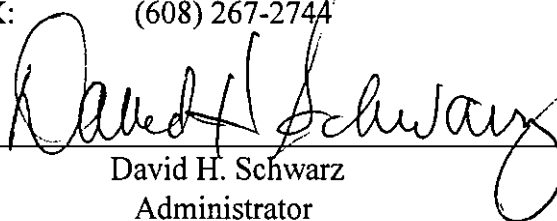
The Division of Motor Vehicles of the Department of Transportation shall issue a motor vehicle title and registration to Terry Kahl free of the security interest of First

Federal for the 1993 Chevrolet Corvette, VIN 1G1YY33P4P5116538, which is the subject of this matter.

Dated at Madison, Wisconsin on August 26, 1997.

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By: \_\_\_\_\_

  
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